

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ELVIS MUÑOZ,

Defendant and Appellant.

B214183

(Los Angeles County
Super. Ct. No. BA347637)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Ronald H. Rose, Judge. Affirmed.

Melissa J. Kim, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

Elvis Muñoz appeals from the judgment entered following a jury trial which resulted in his conviction of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)).¹ The trial court sentenced Muñoz to three years in prison. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts.

a. The People's case.

Miguel Lemus, Muñoz and Marlon Gonzales all live on a small block at 43rd Street in Los Angeles. Lemus had known Muñoz for approximately eight years.

At approximately 2:20 a.m. on October 11, 2008, Lemus and Gonzalez had just returned from a wedding party and were having a conversation on Gonzalez's front porch. As the two men were talking, Muñoz approached and asked Lemus if he could borrow \$5. Lemus said he could not give Muñoz \$5 because he did not have it. Lemus, Gonzalez and Muñoz then moved away from the house, out to Gonzalez's front gate.

While Lemus and Gonzalez continued their conversation, Muñoz, who appeared to be intoxicated, asked Gonzalez for \$5. Gonzalez, who was just finishing a conversation on his cell phone, told Muñoz that he did not have \$5 and that Muñoz should just go home. Gonzalez then gave Muñoz a push with one of his hands. Muñoz interpreted Gonzalez's remark as an insult and he pushed Gonzalez back. Gonzalez then became angry. His posture and the tone of his voice changed. He began to curse in a loud voice and he pushed Muñoz again. At that moment, Gonzalez's cell phone began to ring. Gonzalez answered the phone and, as he was talking, Muñoz punched Gonzalez in the face. As a result of the blow, Gonzalez "[fell] straight down." While cursing at him, Muñoz kicked Gonzalez in the face. While Gonzalez was down, Lemus saw Muñoz hit Gonzalez with his hands and punch Gonzalez with his fists.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Lemus attempted to intervene and told Muñoz to stop hitting Gonzalez. However Muñoz replied by cursing at Lemus. When Muñoz told Lemus that he was “gonna fuck [him] up too,” Lemus became frightened and he ran to his house to get his brother.

When Lemus returned to the scene with his brother, Omar Lemus, they found Gonzalez unconscious, lying on the ground. Muñoz was no longer there. Lemus, Omar Lemus and a third man, Carlos Placencia, carried Gonzalez to his home where, after a few moments, he regained consciousness. However, when Gonzalez could not seem to remember what had happened, he began choking and coughing up blood and he was having difficulty breathing, someone called an ambulance. Paramedics arrived a short time later and took Gonzalez to the hospital. Throughout the altercation, Lemus did not see Muñoz take anything from Gonzalez.

Approximately 30 minutes after the ambulance had come to take Gonzalez to the hospital, police officers arrived. The officers had Lemus identify Muñoz as Muñoz sat in the patrol car.

Gonzalez testified that he had known Muñoz for approximately 10 years. The two men live on the same block, diagonally across the street from one another. At approximately 2:20 a.m. on October 11, 2008, Gonzalez was at home. He had gone to a wedding earlier that evening and was “hang[ing] out” with some friends, including Lemus, on the front porch of his house. At approximately 2:20, Lemus was preparing to go home and he and Gonzalez walked outside to Gonzalez’s front gate. At that point, Muñoz walked by and asked Lemus if he had any money. After Lemus told Muñoz that he did not, Muñoz asked Gonzalez. Gonzalez told Muñoz that he was not going to give him any money and that he should go home. Muñoz did not want to go home and, after Gonzalez told him several times that he should go, Muñoz became angry and said, “Who the fuck do you think you are, do you think you’re my dad[?]” It was then that Muñoz “got aggressive.” Gonzalez believed that Muñoz was under the influence of alcohol and wanted \$5 to buy more beer. It was Gonzalez’s opinion that, if Muñoz had not been under the influence of alcohol, he would not have become so aggressive. Instead, when Gonzalez told Muñoz to go home, Muñoz pushed Gonzalez. Gonzalez, who felt the need

to defend himself, pushed Muñoz back. Lemus then stepped in and took Muñoz to the side for a moment. At that time Gonzalez believed the incident was over; that Lemus would calm down Muñoz and that he would go home. Gonzalez's cell phone rang and he took the call. As he was talking on the phone, he suddenly felt a blow to the left side of his head. He fell to the ground and felt someone kick him in the side of his face until he "blacked out." Gonzalez was taken to the hospital by paramedics where he was treated for injuries to his face and head as well as a sprained ankle. He was released from the hospital after three days, but suffered from headaches for several weeks after the incident. The bruising on Gonzalez's face lasted for approximately three weeks.

Carlos Placencia, who lives next door to Gonzalez, arrived home from work at approximately 2:20 a.m. on October 11, 2008. As he parked his car in his driveway, he saw "several guys" standing outside Gonzalez's house. Placencia went inside his house and was watching television when he heard a commotion outside. It sounded as though people were arguing and Placencia went out to investigate. As Placencia walked out to his front gate, he saw Muñoz hitting Gonzalez. Placencia saw Muñoz hit Gonzalez in the face and head at least four times, then knock him to the ground. While Gonzalez was on the ground, Muñoz continued to hit and kick him. Gonzalez did not move and it was clear to Placencia that he was unconscious. Placencia went inside his house to retrieve his cell phone to call the police. When he came back outside, he saw Muñoz searching for things in Gonzalez's pockets. As Muñoz was walking toward the street corner, he appeared to be holding a cellular telephone.

Los Angeles Police Officers Ruben Rosas and Ruvalcaba responded to a call directing them to 43rd Place. They had been given a description of Muñoz and, as they neared 43rd Place, they saw Muñoz walking down the street. When they took Muñoz into custody, Rosas recovered from Muñoz's right front pants pocket a black L.G. Dare cell phone. Muñoz commented, "That's Marlon's, I picked it up off the ground." At a later time, Rosas took the phone to the County U.S.C. Medical Center where Gonzalez identified it as his.

b. *Defense evidence.*

Elvis Muñoz, testified that he had known Gonzalez for approximately 13 years and considered him to be a good friend and neighbor. Gonzalez had been to Muñoz's house and they had frequently socialized.

On the night of October 10, Muñoz had gone "clubbing" with a friend. He had consumed nine or ten beers and four drinks called "audios mother fuckers." Since he was already intoxicated, Muñoz wished to keep drinking. However, when he returned home at approximately 1:30 a.m. on October 11, he had only \$2.50 left. Muñoz woke up his brother, who gave him \$20. Muñoz then left the house and, as he started to walk to the liquor store, he ran into Gonzalez and Lemus. Muñoz testified: "I bumped into Marlon and Miguel outside. We just started, you know, chitchatting away, you know, just laughing it up and just next, you know, we just started arguing." Muñoz did not remember asking Gonzalez for money but he did remember Gonzalez telling him to "get the fuck out of here," then giving Muñoz a push. When Gonzalez told Muñoz to leave, it angered Muñoz. He did not like the way Gonzalez had spoken to him, then pushed him. When Gonzalez then received a call on his cell phone, Muñoz waited for him to finish. However, while he was still on the phone, Gonzalez told Muñoz, "Didn't I tell you to get the fuck out of here[?]" By this time, Gonzalez was right in front of Muñoz and Muñoz "reacted." He "socked" Gonzalez twice, once to the left eye and once to the right cheek.

Gonzalez fell to the ground and Muñoz kicked him in the right side of his head, knocking him out. Muñoz did not intend to knock out Gonzalez, it was "just like a reaction cause [he] thought [Gonzalez] was gonna swing at [him]." After leaning over and shaking Gonzalez, who would not wake up, Muñoz simply walked away. He testified that "because [he] was mad at the moment, [he] was heated, [he] just walked away. [He] didn't even go to the liquor store." Muñoz did not take anything from Gonzalez. He walked to a friend's house a couple of blocks away and, there, drank more beer.

After a few minutes, Muñoz began to feel badly that he had knocked out Gonzalez and left him on the sidewalk and he decided to return to Gonzalez's house to see what

was happening. When he arrived at the house, Gonzalez was no longer on the sidewalk. However, in a grassy area nearby, Muñoz found Gonzalez's cell phone. He went to the door of the house, but no one responded to his knock. Muñoz then put the cell phone in his pocket and began to walk home. As he was coming out of the gate in front of Gonzalez's house, police officers arrived and took him into custody.

2. Procedural history.

Following a preliminary hearing, on November 10, 2008, Muñoz was charged by information with one count of second degree robbery (§ 211) and one count of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)).

Trial was by jury. However, before any testimony was given, Muñoz's mother approached Lemus and effectively warned Lemus that he should watch what he said while testifying. The district attorney, who had overheard the conversation, reported the incident to the trial court and, during a break in the proceedings, the trial court addressed Muñoz's mother through an interpreter and stated: "Ms. [Muñoz], the prosecutor on this case, has brought it to my attention that while she was attempting to speak to Mr. Lemus, . . . , that you walked in and made a comment to Mr. Lemus that he had better watch what he's saying on the witness stand. [¶] I will not ask you if you did or did not make that statement. I will simply advise you that you are ordered not to speak to any of the prosecution witnesses in this case. That is a direct order of this court. If you violate that order, I will hold you in contempt and place you into custody. [¶] Is that understood?" Ms. Muñoz replied, "Yes." The trial court then stated: "This case will be decided by the jury in this case without any influence by anyone else on the witnesses." Ms. Muñoz replied, "That's fine."

After the prosecution presented its case, defense counsel made a motion for an entry of judgment of acquittal based on that fact that there was insufficient evidence to support the charges (§ 1118.1). In particular, counsel argued there was no evidence to support the charge of robbery. The trial court denied the motion to dismiss either one of the charges.

The prosecutor wished to use Muñoz's misdemeanor conviction of willfully making threats in violation of section 422 to impeach him when he testified. However, defense counsel provided the trial court with *People v. Chatman* (2006) 38 Cal.4th 344, 373, which indicates that misdemeanor convictions, themselves, are inadmissible for purposes of impeachment. Only evidence of the conduct underlying the conviction is admissible subject to the court's discretion. In view of *Chatman*, the trial court determined the prosecutor could not use the fact of Muñoz's prior misdemeanor conviction to impeach him. In addition, the trial court determined evidence of the conduct underlying the conviction would be more prejudicial than probative and that it would, therefore, be excluded.

The trial court instructed the jury on second degree robbery and the necessarily included offenses of grand theft from a person and petty theft. With regard to the assault, the court instructed the jury on simple assault as well as assault by means of force likely to produce great bodily injury. In addition, over defense counsel's objection, the trial court instructed the jury that "[i]f the defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt."

On January 13, 2009, the jury found Muñoz not guilty of second degree robbery in violation of section 211. It, however, found him guilty of assault by means of force likely to produce great bodily injury in violation of section 245, subdivision (a)(1).

At proceedings held on February 2, 2009, the trial court sentenced Muñoz to the middle term of three years in state prison. Muñoz was awarded presentence custody credit for 116 days actually served and 58 days of good time/work time, for a total of 174 days. The trial court ordered Muñoz to make restitution to the victim in the amount of \$2,723.50 (§ 1202.4, subd. (f)), to pay a \$200 restitution fine (§ 1202.4, subd. (b)), to pay a stayed \$200 parole revocation restitution fine (§ 1202.45), and to pay a \$20 court security fee (§ 1465.8, subd. (a)(1)).

Muñoz filed a timely notice of appeal on February 5, 2009.

This court appointed counsel to represent Muñoz on May 20, 2009.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record. By notice filed September 24, 2009, the clerk of this court advised Muñoz to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider.

On October 20, 2009, Muñoz filed a document in which he asks this court to reduce his sentence because there “was . . . no robbery” or “use of violent force in order to obtain [the victim’s] personal belongings.” He asserts “[i]t was just two guys that had a misunderstanding while being intoxicated.” In view of that fact, Muñoz asks this court to “reduce the charges of A-D-W to less[e]r ones.”

Apart from whether this court has the power to reduce a sentence for robbery, Muñoz’s sentence was imposed for his conviction of assault by means of force likely to produce great bodily injury. He was acquitted of the robbery charge and no sentence was imposed for that crime. Neither can this court, absent some error, reduce the charge of assault to a lesser crime. The jury found beyond a reasonable doubt that Muñoz assaulted Gonzalez with force likely to produce great bodily injury and a review of the record supports that finding. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel’s responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.